LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 2 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1967

No. 1190

FRANKLIN S. KINCHELOE, JR., M.D.,

Petitioner,

v.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

WARREN E. MILLER
810 - 18th Street, N. W.
Washington, D. C. 20006
Counsel for Petitioner

INDEX

	Page
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS	2
QUESTIONS PRESENTED	2-5
ARGUMENT	5-12
CONCLUSION	12
APPENDIX	A-I

CITATIONS

Cases:

Hewitt v. Board of Medical Examiner, 148 Cal. 590, 592	4
Surety Corp. v. Sharpe, 232 N.C. 98, 103, 59 S.E. 2d 593	4

Constitutional Provisions:

Amendment V	2

Supreme Court of the United States

October Term, 1967

No.

FRANKLIN S. KINCHELOE, JR., M.D.,

Petitioner,

v.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner, FRANKLIN S. KINCHELOE, JR., M.D., by his counsel, prays that a writ of certiorari be issued to review the decision of the Supreme Court of the State of North Carolina, which decision reversed the judgment of the Superior Court of Wake County, North Carolina.

The opinion of the Court below was filed November 29, 1967 and final judgment was entered on the same day. (See certificate of Clerk dated December 12, 1967) Case reported in 272 N. C., p. 116.

A Petition for Extension of Time to file this Petition for a Writ of Certiorari was timely filed and petitioner was granted an extension of time for filing said petition to and including March 2, 1968.

JURISDICTIONAL STATEMENT

The jurisdiction of the Supreme Court of the United States is invoked pursuant to the terms and provisions of 28 U.S.C.A., Section 1257, Subdivision 3, and the petitioner's constitutional safeguards reflected in the Amendments to the United States Constitution have been violated resulting in the deprivation of property without due process of law and the denial of procedural due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V. "No person shall be * * * deprived of * * * property without due process of law."

QUESTIONS PRESENTED

1. DID THE COURT BELOW SANCTION A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION AS MENTIONED IN RULE 19-1(b) OF THE RULES OF THIS COURT?

II. DID THE ACTION OF THE COURT BELOW CONSTITUTE A LACK OF "DUE PROCESS" IN DEPRIVING PETITIONER OF A FAIR HEARING?

III. IS THE LACK OF A FAIR AND IMPARTIAL HEARING SUFFICIENT GROUNDS FOR REVERSING THE DECISION OF THE LOWER COURT?

IV. SHOULD EVIDENCE WHICH IS INADMISSIBLE UNDER §90-14.6 OF THE GENERAL STATUTES OF NORTH CAROLINA BE PROPERLY USED AS A BASIS BY THE BOARD OF MEDIGAL EXAMINERS OF THE STATE OF NORTH CAROLINA FOR DETERMINING THE GUILT OF A PHYSICIAN OF UNPROFESSIONAL AND DISHONORABLE CONDUCT AND TO JUSTIFY THE REVOCATION OF HIS LICENSE?

V. DID THE CROSS EXAMINATION OF PETITIONER BY A FAR GREATER NUMBER OF PERSONS THAN PERMISSIBLE UNDER THE SUPERIOR COURT RULES OF PRACTICE CONSTITUTE ACTION THAT WAS CONTRARY TO DUE PROCESS OF LAW?

Rule 4 of the Superior Court of North Carolina provides:

"When several are employed on the same side, the examination or cross examination

of each witness shall be conducted by one counsel."

At the hearing petitioner was questioned by seven persons besides the attorney for the Board and no one was present to see that he received a fair and impartial hearing. This procedure violated ¶90-14.6 of the General Statutes of North Carolina requiring the Board to "admit and hear evidence in the same manner and form as prescribed by law for civil actions" for cross-examination to be performed, as was done here, contrary to Statute, was prejudicial to petitioner and requires the Court to set aside the decision of the Board for the lack of a fair and impartial hearing, since the hearing upon which the decision to revoke petitioner's license was based was conducted contrary to ¶90-14.6 of the General Statutes of North Carolina.

VI. DOES THE LOSS OF A VALUABLE PROPERTY RIGHT BECAUSE OF THE LACK OF "DUE PROCESS" PROTECTION AUTHORIZED BY THE FEDERAL AND NORTH CAROLINA STATE CONSTITUTIONS REQUIRE REVERSAL HERE?

The right to practice medicine is a valuable property right (*Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 592) which should not be denied in a manner or for reasons which contravene the due process protection clause of the Fourteenth Amendment to the United States Constitution.

Article I, Section 17, of the North Carolina Constitution, prescribes that "no person * * * ought to be in any manner deprived of his property, but by the law of the land. The term "law of the land" is synonymous with "due process of law", which phrase appears in the Federal Constitution. *Surety Corp. v. Sharpe*, 232 N. C. 98, 103, 59 S.E. 2d 593.

From the manner in which the proceeding below was conducted as shown by the entire record it is clear that petitioner did not have a fair and impartial hearing.

ARGUMENT

PETITIONER'S RIGHT TO BE REPRESENTED BY COUNSEL AND HIS RIGHT TO CONFRONT WITNESSES WAS NOT KNOWINGLY AND INTELLIGENTLY WAIVED BY HIM

The record shows that several members of the Board asked questions concerning his previous trial by the Board which occurred some 3-1/2 years earlier.

It is urged that this evidence was extremely prejudicial and should not have been considered by the Board in this proceeding.

Upon appeal there was a decision by Judge Lacey M. Thornburg of the Superior Court of Wake County on September 17, 1967 in which he found (page 11 of typewritten transcript) that petitioner did not receive a fair and impartial hearing by the Board, that incompetent evidence outside the scope of his notice was heard and most probably considered by the Board in reaching its decision; and the Board did not comply with the mandatory provisions of GS 90-14.6. From these findings and rulings the Board appealed. Both parties filed exceptions.

The finding of the Board of Medical Examiners of the State of North Carolina that Franklin S. Kincheloe, Jr., M.D., had been guilty of unprofessional and dishonorable conduct unworthy and affecting his profession was unsupported by competent evidence.

Dr. Kincheloe's right to be represented by counsel at the Board hearing was not waived by him.

The right to be confronted by witnesses at the hearing before the Board was not waived.

There was insufficient competent evidence to justify the finding that Dr. Kincheloe's license to practice medicine in North Carolina should be revoked.

In a hearing held by the Board on January 6, 1967, two months and five days after he was served, Dr. Kincheloe was not represented by counsel. He was asked if he had counsel (R. 3) and he said in answer to the question, "I do not feel it is necessary. No;" and upon being handed a copy of the charges he asked to be excused from hearing the testimony of the witnesses concerning them. He declined to cross examine witnesses (R. 30).

Throughout that portion of the hearing seven witnesses were heard against the interests of Dr. Kincheloe. Examination of such was very limited in extent and nature and little effort was made by members of the Board or its attorney to test the credibility of the evidence offered (R. 30) (Tr. 60-68). At this hearing Dr. Kincheloe testified in his own behalf (Tr. 61, *et seq.*). Following his testimony he was subjected to strenuous cross examination by the attorney for the Board, the President and Secretary of the Board and by four other Board members (R. 30-31). No transcript of the foregoing cross examination is contained in the record (R. 30-31).

Reference to a previous appearance before the Board by Dr. Kincheloe concerning revocation of his license at that time was inquired into, but does not appear in the record now before this Court.

In the course of the hearing before the Board numerous references were made to Dr. Kincheloe's confinement and treatment in a state mental institution, although such were not contained in the notice served upon this physician prior to the hearing.

Dr. Kincheloe did not get a fair and impartial hearing before the Board of Medical Examiners of North Carolina and his rights were violated by such Board.

GS 90-14.6 required in proceedings held pursuant to this Article that evidence must be admitted in the same manner and form as prescribed by law for civil actions. The fact that this was not done was sufficient to nullify the decision of the Board.

Petitioner was served with notice of charges and accusations November 1, 1966 (R. 30) when he was a patient in a state mental institution. The Board held a hearing on his case January 6, 1967, approximately two months later. There is no evidence in the record that at the time of the hearing that his mental condition has improved or that it had subsided, and his actions at this hearing leads to the conclusion that he remained mentally ill. In the absence of evidence to the contrary, his mental condition which required hospitalization in a state mental institution can be assumed to have continued until the contrary is shown. This is borne out by his conduct at the hearing when he declined the offer of counsel to represent him and asked to be excused from hearing the testimony of the witnesses concerning him and declined to cross examine the witnesses (R. 30). We may, therefore, properly conclude that Dr. Kincheloe was mentally ill at the time of his hearing on January 6, 1967. For such a helpless person to be required to defend himself constituted reversible error.

It was not proper for the Board to consider matters which occurred over three years ago with respect to the revocation of petitioner's license to practice medicine when they here reach a decision about a recent occurrence.

Petitioner needed counsel to assist him, as will be seen from a study of the record and ordinary fairness requires this Court to take cognizance of this fact.

The Court below erred in holding that its erroneous admission of evidence does not require a reversal of the decision of the Court below. This evidence was prejudicial and the Board's findings based thereon were therefore erroneous.

The brief of Dr. Kincheloe filed in the Supreme Court of North Carolina at page 8 contains the following statement:

> "Beginning on R. p. 79 through R. p. 108, the record shows that 19 times licensee was asked a question and then cut off or prevented from completing his answer."

It is apparent from the record that petitioner sorely needed counsel. He was questioned about matters that were not contained in the notice served upon him. Evidence was admitted contrary to GS 90-14.6 which was not in the same manner and form as prescribed for civil actions. The hearing was required to be held in the same manner as was customary in civil actions, but was not, as the record will show. His answers to questions indicated he needed counsel. This was proved by the inefficient manner in which he conducted his defense. Clearly, Dr. Kincheloe did not receive a fair and impartial hearing before the Board.

His right to be represented by counsel at the Board's hearing and his right to confrontation of witnesses called at the hearing was not knowingly and intelligently waived by petitioner

and his personal appearance before the Board at the meeting held on January 6, 1967 did operate to waive any defect in the notice of this hearing, as was held by the Court below. The Board itself realized that it had committed error because it assigned as error here (Exception No. 2, R. 215) that "no reference was made in the notice to any previous appearance by Dr. Kincheloe before the Board" although reference to his previous appearance before the Board by Dr. Kincheloe concerning the revocation of his license at that time was inquired into in depth at the January 6, 1967 hearing before the Board (R. 125).

The petitioner takes exception to Conclusions of Law numbered 2, 3, 4, 5, 6 and 7. There are as follows:

2. "That any defect in notice of hearing before the Board was waived by Dr. Kincheloe through his personal appearance before the Board at its meeting held on January 6, 1967, at the appointed time and place set forth in the notice of charges and accusations."

3. "That any right to be represented by counsel at the hearing was knowingly and intelligently waived by Dr. Kincheloe."

4. "That any right to confrontation by witnesses called at the hearing before the Board was knowingly and intelligently waived by Dr. Kincheloe."

5. "That the trial and acquittal by Dr. Kincheloe of criminal charges arising out of the incident referred to in the notice of charges and accusations is not res judicata and is not a bar against the proceeding before the Board of Medical Examiners of the State of North Carolina."

6. "That there is sufficient competent evidence in the record to support the findings by the Board that Dr. Kincheloe's license to practice medicine in the State of North Carolina should be revoked."

7. "That there is sufficient finding of fact upon which the Board could base its conclusions that Dr. Kincheloe was guilty of unprofessional and dishonorable conduct."

The following exceptions and assignments of error of the Board of Medical Examiners of the State of North Carolina are also urged upon the Court by petitioner:

Board's Exception No. 7 (R. 127) which stated that Dr. Kincheloe did not receive a fair and impartial hearing by the Board.

Board's Exception No. 8 (R. 129) that the Court include in its conclusion of law the following: "that incompetent evidence outside the scope of his notice of charges and accusations was heard and most probably considered by the Board in reaching its decision".

Board's Exception No. 9 (R. 127) that the Court include in its conclusion of law the following: "The Board at its hearing on this matter did not comply with the mandatory provisions of GS 90-14.6".

Board's Exception No. 10 (R. 12) is that the Court ordered remanded to the Board of Medical Examiners for a hearing *de novo*.

Petitioner concurs in the foregoing Exceptions of the Board numbered 7, 8, 9 and 10 and recommends that the Court approve them.

On November 1, 1966, Dr. Franklin S. Kincheloe, Jr., hereinafter called petitioner, was served with notice from the Board of Medical Examiners of the State of North Carolina that certain charges and accusations had been made against him and that a hearing on these charges which related to the alleged mistreatment of Deborah Edwards, now Deborah Edwards Stanley, on August 17, 1966, would be held on January 6, 1967. At said hearing the Board of Medical Examiners of the State of North Carolina found petitioner guilty of unprofessional and dishonorable conduct and ordered that his license to practice medicine be revoked. The Court held that the Board did not comply with GS 90-14.6 which required that in proceedings under this Statute the Board should admit and hear evidence in the same manner and form as prescribed by law for civil actions. The Court indicated that questions regarding the criminal trial of rape against petitioner were improper, but the Court did not so hold. The Court also found that petitioner did not receive a fair and impartial hearing in that "incompetent evidence outside the scope of his notice was heard and most probably considered by the Board". With this, petitioner agrees and urges now that it requires this Court to reverse.

The Board held that petitioner's right to be represented by counsel and his right to confront witnesses was knowingly and intelligently waived. But the record does not justify such a waiver. He told the Court that he had expected the Board to take the transcript of his trial in the Superior Court "as these witnesses had been cross-examined and then I felt they would take all this information available to them in the court proceedings".

He said he did not take a lawyer with him to the Board's proceedings because he could not afford the services of a lawyer and did not have any money from any source with which he could have employed an attorney; he had never cross examined any witnesses and was not experienced in questioning witnesses or otherwise defending himself in this proceeding before the Board. He had requested that he not be present when the witnesses testified and that he be excused from this proceeding. This indicated an inability on the part of petitioner to properly appraise the situation as he should have.

The Court of Appeals held that the evidence was sufficient to sustain the findings of the Board and the facts found support its order revoking Dr. Kincheloe's license. The order against the Board was reversed and the case referred to the Superior Court of Wake County for judgment revoking petitioner's license.

CONCLUSION

In view of the foregoing the Court is urged to reverse the decision of the Court below for the reasons hereinbefore stated.

Respectfully submitted,

WARREN E. MILLER
810 - 18th Street, N. W.
Washington, D. C. 20006
Counsel for Petitioner

APPENDIX

IN THE MATTER OF:	)	
FRANKLIN S. KINCHELOE, JR.,	)	
M.D.,'s APPLICATION FOR	)	
REVIEW OF ORDER OF BOARD	)	No. 540 – Wake
OF MEDICAL EXAMINERS OF	)	
THE STATE OF NORTH CAROLINA	)	

Comes now by and through his Attorney, Franklin S. Kincheloe, M.D., and moves the Honorable Court to Stay the mandate on the Judgment entered by the Supreme Court of North Carolina on November 29, 1967, affirming the revocation movant's license to practice medicine in the State of North Carolina.

Movant seeks this Stay in order to afford time within which to file a petition for Writ of Certiorari in the Supreme Court of the United States.

In support of this application and motion, movant urges that the revocation of his license to practice medicine in the State of North Carolina was in violation of his Constitutional Rights; that it deprives him of property without due process of law.

Movant further represents that on account of revocation to practice is arbitrary, capricious without good cause and legal justice.

Movant sincerely represents this motion to Stay filed in good faith and not for the purpose of delay.

/s/ Franklin S. Kincheloe, M.D.

By: /s/ Edward Gibbon Hobbs, Sr.
Attorney for Applicant

[Certificate of Service]

Movant relies upon Amendment V (Due Process) of the Constitution of the United States to support his motion, and upon the fact he was acquitted by an Honorable Jury of Impartial Jurors in the Superior Court of Johnston County on the same evidence used by the North Carolina Medical Board revoking applicant's license to practice medicine in North Carolina (see criminal case 12,680, State vs Frank S. Kincheloe, Jr., M.D.) and upon the applicable rules of the Supreme Court of the United States providing for review of Judgments of the highest Court of the States when serious Constitutional questions are involved.

Respectfully submitted, this the 27th day of December, 1967.

/s/ Edward Gibbon Hobbs, Sr.
Attorney for Franklin S.
Kincheloe, Jr., M.D.
Box 501
Selma, North Carolina

ORDER TO STAY EXECUTION OF THE JUDGMENT

This cause coming on to be heard before The Honorable R. Hunt Parker, Chief Justice of the Supreme Court of North Carolina, upon the motion filed by movant, Franklin S. Kincheloe, Jr., M.D., for a stay of execution of judgment rendered by the Supreme Court in the above-entitled cause on the 29th day of November, 1967, and the Court being of the opinion for good cause shown, the motion should be granted.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED and DECREED that the execution of the judgment or order be and the same is stayed pending final determination of the Petition for writ of certiorari to be filed by the movant, Franklin S. Kincheloe, Jr., M.D., with the Supreme Court of the United States; provided said Petition is filed within the time required by Rule 22 of the Supreme Court of the United States;

IT IS FURTHER ORDERED that this stay remain in effect until its writ of certiorari is denied by said Court or affirmed by said Court.

IT IS FURTHER ORDERED that mandate on said judgment be and is hereby stayed to and including the 27th day of February, 1968.

IT IS FURTHER PROVIDED that movant shall abide by the judgments or orders of this Court and of the Superior Court of Wake County if the Application of the movant to the Supreme Court of the United States for writ of certiorari be denied or if such application be granted and the determination of that Court, upon the hearing of the matter, be that the decision of the Supreme Court of North Carolina set forth

in the opinion of this Court issued on the 29th day of November, 1967 is affirmed or otherwise upheld.

This 27th day of December, 1967.

/s/ R. Hunt Parker, Chief Justice of the Supreme Court of North Carolina

---

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 2nd, 1968.

/s/ Earl Warren
Chief Justice of the United States

Dated this 20th day of February, 1968.

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing petition, postage prepaid, to J. H. Anderson, Attorney for the Board of Medical Examiners for the State of North Carolina this 2nd day of March, 1968.

WARREN E. MILLER